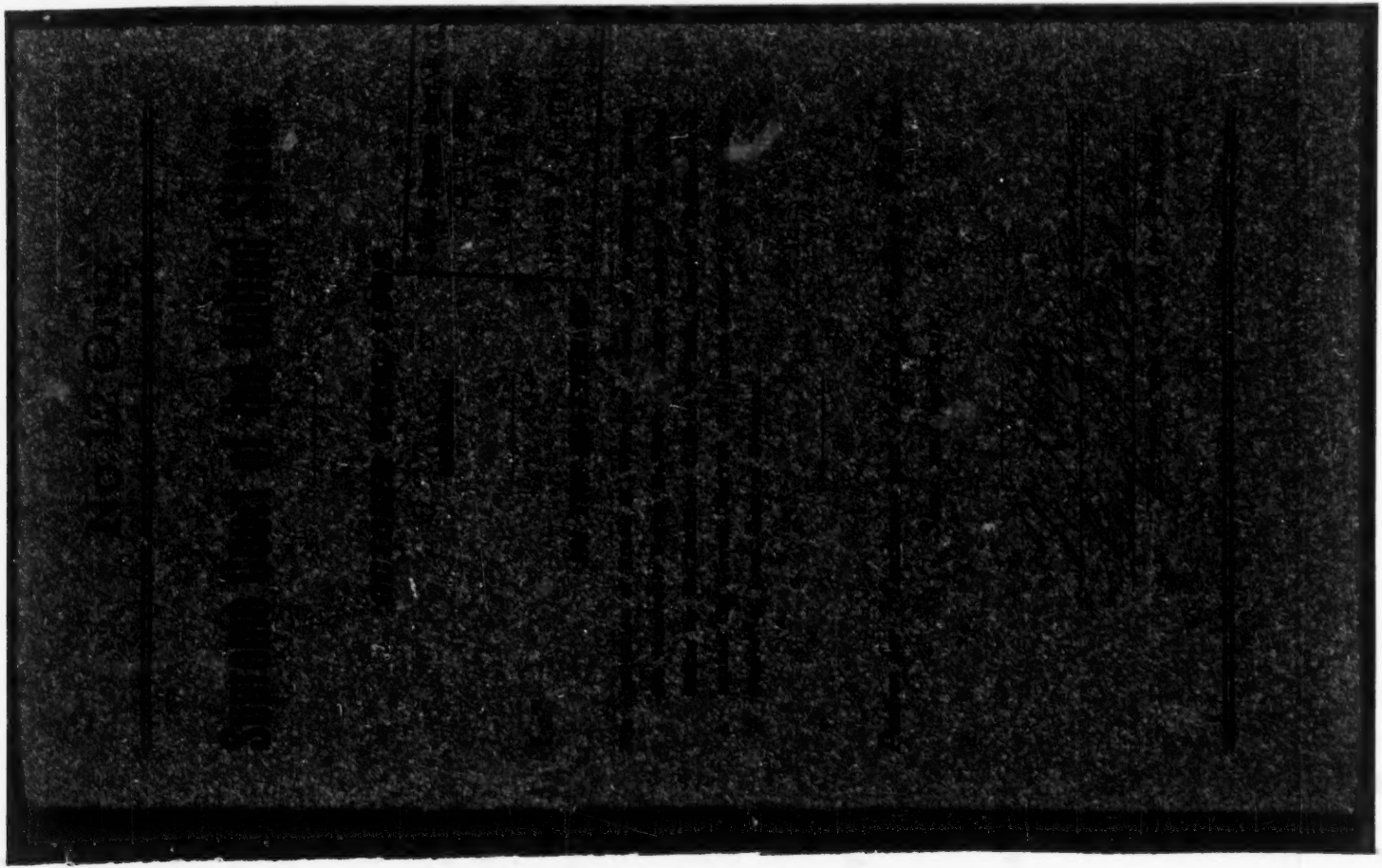

In the

Supreme Court of the United States

IN THE MATTER OF

Application of Frank D. Winn for a writ of mandamus against the Honorable Smith McPherson, District Judge of the United States for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, Frank D. Winn, and moves for leave to file the petition for writ of mandamus hereto annexed, and moves further, that a rule be entered and issue directing the Hon. Smith McPherson, District Judge of the United States for the Southern District of Iowa, Central Division, and directing the Circuit Court of the United States, for the Southern District of Iowa, Central Division, to show cause why a writ of mandamus should not issue against them, and each of them, in accordance with the prayer of said petitioner, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

W. N. Brenner

Guy A. Miller

Attorneys and Counsel for Petitioner.

In the
Supreme Court of the United States

IN THE MATTER OF

The application of Frank D. Winn, for a writ of mandamus against the Hon. Smith McPherson, District Judge of the United States, for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States, for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Frank D. Winn, who is a resident of Randolph, in Clay County, State of Missouri, respectfully shows:—

I.

That your petitioner, Frank D. Winn, on the 28th day of May, A. D. 1908, filed in the District Court of the State of Iowa, in and for Polk County, at Des Moines, Iowa, a certain suit, numbered therein 17325, Law, wherein he was Plaintiff, and the American Express Company was Defendant.

II.

(Original Petition Filed in State Court.)

That the said petition of plaintiff therein filed was in words and figures as follows, to wit:—

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY.

SEPTEMBER TERM, A. D., 1908.

"Frank D. Winn,

Plaintiff. In Law. No. 17325.

vs. Petition.

The American Express Company,

Defendant.

The plaintiff, for cause of action against the defendant, states:—

That the defendant is a corporation organized under and existing by virtue of the laws of the State of New York, and doing business as a common carrier in the County of Polk, State of Iowa.

That on the 30th day of August, A. D. 1907, J. J. Ward and B. P. Smith, both of Belleville, Kansas, were the absolute owners of a certain boar named "Statesman," and that the said J. J. Ward had the said boar on exhibition at the Iowa State Fair, in Des Moines, Iowa, on the said date.

That on the 30th of August, A. D., 1907, at the close of the said Iowa State Fair, the said J. J. Ward entered into a written contract with the said American Express Company, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, for the transportation of the said boar from Des Moines, Iowa, to Lincoln, Nebraska.

That on the said date by virtue of the said written contract, the said J. J. Ward delivered the said boar to the American Express Company, at the State Fair Grounds, in Des Moines, Iowa, advising the company at that time that the said boar was a very valuable one, and that he was to be shipped to Lincoln, Nebraska, the said company well knowing that the said boar was a very valuable one.

That the said American Express Company agreed to haul the said boar to the Lincoln car, in a single covered wagon, by himself. That when the said J. J. Ward delivered the said boar to the said Express Company, the said company loaded the said boar in a transfer wagon, with nine other crated hogs. That the said Express Company placed one crate in front of, another crate on top of, and one crate on each side of the said boar Statesman, completely cutting off the circulation of air from him. That the night of the 30th of August, A. D. 1907, was a very hot one, and that the boar, a short time after he was loaded, began to suffer greatly with the heat.

That the said boar at the time he was delivered to the said Express Company, was in good sound condition.

That the said wagon containing the said boar was driven by the driver to the office of the said Express Company, and that the said driver selected the roughest route over which to haul the said boar. That the said driver of the wagon did drive the same across many railroad tracks on the way to the express office, and when he arrived there he was ordered to take the said boar to the Lincoln car and unload him therein.

That the said driver recrossed the said tracks and proceeded to the Lincoln car. That he was told that he could not unload the said hog there; that the said wagon and the hogs therein were driven back across the said tracks to the office of the said Express Company, whereupon the driver reported for further orders. That at this time the said J. J. Ward entered the said office of the Express Company and asked those in charge if they could not help him get the boar unloaded, and further told them that the boar was a very valuable one, and that the said boar was suffering greatly with the heat. That the said parties in charge of the said office told the said J. J. Ward that they could do nothing for him.

That thereupon the said driver of the said wagon was instructed to haul the said boar across the said tracks and unload him on a truck. That the said driver did recross the said tracks and unloaded the said boar upon a truck, and that five minutes after the said boar was unloaded he was dead. That the said American Express Company did negligently load the said boar in the said transfer wagon with the nine other hogs. That the said American Express Company did negligently load the said hogs so as to shut off the free circulation of air from the said boar, "Statesman."

That the said American Express Company did negligently drive the said wagon with the said boar therein over a very rough route, there being a much better and smoother route they could have selected. That the said American Express Company did negligently handle the said boar from the time they received him until he was unloaded, five minutes before his death, and failed wholly to use any care whatever with the said boar.

That the driving in a careless manner over the rough roads and across the said railroad tracks many and divers times, did greatly shake up, jolt, and jostle the said boar, and did heat up the said boar to a dangerous temperature.

That the said J. J. Ward was free from all contributory negligence whatever.

That the said American Express Company by their said negligence, caused the death of the said boar. That the reasonable value of the said boar Statesman, at the time of his death, was Eight Thousand Dollars and that the said J. J. Ward, and B. P. Smith, owners of the said boar, were damaged by the negligent killing of the said boar on the part of the said American Express Company, in the sum of Eight Thousand Dollars.

That the said J. J. Ward, and B. P. Smith have assigned to the plaintiff, Frank D. Winn, in writing, all their right,

title, and interest in and to the said claim of action against the said American Express Company, a copy of which assignment is hereto attached, marked "Exhibit B" and made a part hereof.

That the said J. J. Ward, B. P. Smith, nor this plaintiff, neither jointly nor severally have received anything for their said damage, and the entire amount is now due and unpaid.

Wherefore plaintiff, Frank D. Winn, demands judgment against the American Express Company, in the sum of Eight Thousand Dollars with interest thereon at the rate of six per centum per annum from August 30th., 1907, together with the costs of this action.

Signed. FRANKLIN & MILLER,
Attorneys for Plaintiff."

"EXHIBIT A".

NOTICE TO SHIPPERS. The shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.

AMERICAN EXPRESS COMPANY-LIMITED LIABILITY LIVE STOCK CONTRACT. (69) Aug. 5.

(In Duplicate.)

This contract made at the Fair Grounds, Des Moines, Iowa, this 30th day of August, 1907, between American Express Company, of the first part, hereinafter called the Express Company, and J. J. Ward, hereinafter called the Shipper, party of the second part.

1. Witnesseth: that the Express Company undertakes to forward to the nearest point to destination reached by it

(or if destined to a point beyond its lines, to forward to transfer point convenient to destination, and there deliver to connecting carrier to complete the transportation), the animals hereinafter mentioned, of which the shipper declares himself to be the owner (or duly authorized agent of the owner), to wit:

(Enter on following lines, in words, not figures, the number and the kind of animals or birds.)

One Hog crated, consigned to J. J. Ward, at Lincoln, Neb., for the sum of _____dollars and _____cents which charge is fixed by and based upon the value of said animals as declared by the shipper, as hereinafter mentioned. Est 5.50.

2. And in consideration of the premises, said parties agree:—that the shipper, before delivering the said animals to the said Express Company, demanded to be advised of the rates to be charged for the carriage of the said animals as aforesaid, and thereupon was offered by said Express Company alternative rates proportioned to the value of the said animals, such value to be declared and fixed by the shipper, and according to the following tariff of charges, viz.:—

(Enter below in all cases what the express charges are or would be at the values specified in paragraph three.)

3. For Horses, Jacks, or Mules of a value not exceeding $75.00 ea. _____ _____ _____$_____

For Bulls, Burrows, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers, or animals not otherwise specified, of a value not exceeding $50.00 each _____ _____ _____ _____$10.10.

For Cats, Ferrets, Guinea Pigs, Rabbits, Fancy Pigeons, or Fancy Fowls, or other Live Fowls, Birds, or Reptiles of a value not exceeding $5.00 each _____$_____

For a carload of Horses, Jacks, or Mules, of a value not

exceeding $75.00 for each animal ----------$——

For a carload of Bulls, Burrows, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers or animals not otherwise specified, of a value not exceeding $50.00 for each animal----------$——

4. And the said parties further agree that any excess value declared by the shipper, over and above the limit fixed by the company's rate, is to be charged for, in addition to the above mentioned charge, according to the following schedule, to wit:—

When the merchandise rate of the company between the points of shipment of animals is	The additional chg. for excess value is
Not over $1.00 per 100 lbs----------	5% on excess valuation.
Over $1.00 per 100 lbs. and not over $2.00 per 100 lbs.	7% on ex. Val.
Over $2.00 per 100 lbs. and not over $3.00 per 100 lbs	10% on ex. Val.
Over $3.00 per 100 lbs. and not over $5.00 per 100 lbs	12% on ex. Val.
Over $5.00 per 100 lbs----------	15% on ex. Val.

5. The shipper, in order to avail himself of said alternative rates and in consideration thereof, being asked by the said Express Company to value the said property, now declares the value hereinafter mentioned to be the true values of said animals so to be shipped, as follows, to wit:— (Number and kind.) One Hog crated. Value each $50.00.

(Shipper must in all cases be required to declare value.)

6. The shipper agrees that the responsibility of the Express Company shall be that of a forwarder only and not that

of a common carrier, and that the Express Company shall not be liable for the conduct or acts of the animals to themselves, or which result from their propensities or natures, such as biting, kicking, goring or smothering, nor for loss or damages arising from the condition of the animals themselves, which risks are assumed by the shipper. The shipper hereby releases and discharges the Express Company from all liability from delay, injury to or loss of such animals from any cause whatever, unless such delay, injury, or loss shall be caused by the negligence of the agents, employees of the Express Company, and in such event the Express Company shall be liable to the extent of the actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the shipper to be the true value thereof; and for the purpose of ascertaining or assessing such damage whether the same be a total or partial loss, the value of said animals, as herein declared by the shipper shall be conclusively deemed to be the true value thereof.

7. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the said animals, and the same is not paid at once, the shipper agrees that the Express Company at its option, may retain said animals with ordinary and reasonable care, at the risk and expense of the shipper, or may return same to the shipper, the shipper to pay transportation charges both ways and all other expenses, and it is understood that the conditions of this contract shall apply to any such returned shipments.

8. The shipper agrees to load, tranship, and unload said animals at his own risk, and during the transportation thereof, to unload and load the said animals whenever the same may be necessary or required, at his own risk, and to furnish the necessary laborers therefor; and further agrees to cause

the necessary attendants to accompany and take charge of said animals, the Express Company furnishing free transportation for the attendants who have signed the attendants' contract appended hereto, and also furnishing laborers to assist in loading and unloading said animals, at the point of shipment and destination, such attendants and laborers not to be regarded, deemed or taken to be the agents of the Express Company for any purpose whatever, but, on the contrary, such attendants and laborers shall be deemed and taken to be the agents of the shipper.

9. Upon the arrival of the said animals at destination, the shipper or consignee shall forthwith receive said animals and pay the charges due thereon, and if for any cause the shipper or consignee shall fail or refuse to duly receive the same and pay any charges, then the Express Company, or the connecting carrier having the animals in charge, may as the agent of the shipper, have such animals put and provided for in some suitable place at the cost and risk of the shipper or consignee, and at any time or times thereafter may sell the same or any number of them, at public or private sale, with or without notice as the said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much as may be needed, for the payment of any freight or charges that may be due, and other necessary and proper costs and expenses.

10. All the stipulations and conditions in this contract shall inure to the benefit of and extend to each and every carrier, Railroad Company, Express Company, Forwarder, firm, corporation, or person to whom the Express Company may entrust or deliver said animals for transportation, and shall define and limit the responsibility and liability therefor of any such company or person for the acts of their agents or employees.

11. The shipper agrees that in no event shall the Express Company be liable for any loss or damages unless the shipper shall, within thirty days after such loss or damage occurs, give notice in writing of his claim therefor to the Express Company, and that any suit against the Express Company for the recovery of loss or damage to the property herein specified shall be commenced within six months next after such loss or damage shall have accrued, or be forever barred, and should any suit be commenced against the Express Company after the expiration of the said six months, the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding, and there shall be no waiver of the aforesaid time within which said claim shall be made, or within which suit shall be commenced, unless the Express Company expressly agree in writing to waive the same, and the shipper hereby so expressly stipulates and agrees. It is further agreed that any question arising under this contract shall be determined by the law of the State of New York.

Signed in duplicate. AMERICAN EXPRESS COMPANY.
By W. E. King, Agent.
Party of first part.
J. J. WARD,
(Owner or duly authorized agent.)
Party of the second part.

"EXHIBIT B".

ASSIGNMENT OF CAUSE OF ACTION.

We, J. J. Ward and B. P. Smith, being owners of a claim and cause of action against the American Express Company, growing out of their careless and negligent handling of our Poland China Boar, known as Statesman, placed in the hands of the said Express Company by us during the close of the

Iowa State Fair, at Des Moines, Iowa, in the fall of the year 1907, said careless and negligent treatment and care of said Poland China Boar, Statesman, by said Express Company at Des Moines, Iowa, at said time, resulting in the death of the said boar, for a valuable consideration, to us in hand paid by Frank D. Winn, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over to the said Frank D. Winn, all of our claim and right and cause of action against the said American Express Company, or any other express company, corporation, or person, growing out of its carelessness or negligence, resulting in injuries to, and the death of, the said boar Statesman, and we grant and assign to the said Frank D. Winn all our rights in the premises, including the right to maintain and institute such action or cause of action against the said American Express Company, or such other express company, corporation or person, that may be chargeable and liable for the death of the said boar, Statesman, as may be meet and proper, and to maintain such action in his own name.

Signed and delivered at Bellville, Kansas, on this 16th day of May, A. D. 1908.

Signed. J. J. WARD,
B. P. SMITH.

State of Kansas,

ss

County of Republic.

Be it remembered that on this 16th day of May, 1908 before me N. J. Ward, a notary public in and for said state and county, personally appeared J. J. Ward and B. P. Smith, to me personally known to be the identical persons named in and who executed the foregoing assignment of claim and cause of action to Frank D. Winn, and they did separately

acknowledge to me that they executed the same as their free and voluntary act and deed for the purposes therein stated.

Signed. N. J. WARD.

Notary Public in and for said County.

My Commission expires the 26th day of Sept. A. D. 1911.

SEAL

III.

Your petitioner further shows that the said defendant was duly served with an original notice of the said cause of action, citing it to appear in said court and make defense thereto. That within the time required by law the said defendant filed in the said District Court of Iowa in and for Polk County, a petition to remove said cause from the said District Court to the Circuit Court of the United States for the Southern District of Iowa, Central Division. That said petition for removal is as follows:

PETITION FOR REMOVAL.

In the District Court of the State of Iowa in and for Polk County.

"Frank D. Winn, *Plaintiff*,)
vs.)
American Express Company, *Defendant*.)

PETITION FOR REMOVAL TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Your petitioner, the American Express Company, respectfully shows that it is the defendant in the above entitled suit,

and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2000.00).

That your said petitioner was, at the time of the bringing of this suit, and still is a joint stock association organized under the laws of the State of New York in such cases made and provided, and that the plaintiff was then and still is a citizen of the State of Missouri.

Your petitioner further shows that the said suit is one of a civil nature in which the plaintiff seeks to recover from the defendant the sum of Eight Thousand Dollars ($8000.00) as damages on account of an alleged failure on the part of the defendant to comply with its obligations as a common carrier in the shipment and transportation of a hog which the assignor of plaintiff offered to the defendant and which the defendant received from the assignor of plaintiff on or about the 30th day of August, A. D. 1907, for transporation from the State Fair Grounds at Des Moines, in the State of Iowa, to the City of Lincoln in the State of Nebraska.

That the defendant denies that it failed in any respect to perform its obligations with reference to the transportation of the said hog, and denies that it is liable upon the claim set up in the said suit, in any amount, and denies that, in any event, its liability could exceed the sum or value of fifty dollars ($50.00).

That the said suit is one arising under the laws of the United States. That your petitioner is, and was, at all of the times mentioned in the petition in this suit, a common carrier engaged in trade and commerce between the several states of the United States, and between the territories thereof, and between the territories and the several states.

That at the date of the shipment in question your petitioner was, and ever since that time has been subject to the provisions of the act of Congress, entitled "An Act to

Regulate Commerce", approved February 4, 1887, and of the acts of Congress amendatory thereof, and supplementary thereto, and that the alleged cause of action set up in said suit is based upon, grows out of, and necessarily involves the construction of said acts of Congress. That among the questions arising under said acts and necessarily involved in said suit are,

(a) Whether the contract on which said suit is based is legal and enforceable by the shipper or the plaintiff as his assignee in view of the fact that it appears on the face of this contract that if the claim made in the petition as to the value of the hog in question is true, the shipper, by means of its undervaluation, violated the penal provisions of the Act to Regulate Commerce as amended.

(b) Whether, under the Act to Regulate Commerce, as amended, the plaintiff may assert a claim for damages in an amount in excess of the value declared by the shipper to be the true value, and, upon this declaration, made the basis of the rate for the interstate transportation in question.

(c) Whether, under the Act to Regulate Commerce as amended, the provisions of the contract in suit limiting the liability of the defendant to the sum declared by the shipper in said contract to be the actual value of the animal in question is valid and enforceable.

(d) Whether under the Act to Regulate Commerce, as amended, the plaintiff, as assignor of the shipper, is estopped to set up in this suit that the hog in question was a greater value than the value declared to be its true value in the contract sued upon.

(e) Whether undervaluation of the hog in question by the shipper in order to obtain a rate for its interstate transportation lower than the published established rate constituted a violation by the shipper of the penal provisions of the Act to Regulate Commerce, as amended.

(f) Whether, if said penal provisions were so violated, the plaintiff's suit is founded upon what in law is his own wrong so as to preclude a recovery by him.

(g) Other questions arising under said Act to Regulate Commerce, as amended.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to said circuit court and to accept the said surety and bond, and to cause the record herein to be removed unto said circuit court of the United States in and for the southern district of Iowa, central division, and he will ever pray.

Signed. N. T. GUERNSEY,
Attorney for Petitioner.

State of Iowa,)
)SS.
Polk County.)

I, N. T. Guernsey, being duly sworn, on oath state that I am the attorney for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statement and allegations therein contained are true, as I verily believe.

N. T. GUERNSEY.

Sworn to before me and subscribed in my presence by the said N. T. Guernsey on this 11th. day of September, 1908.
SEAL. CHAS HUTCHINSON.
Notary Public in and for Polk County, Iowa."

IV.

(OBJECTIONS TO REMOVAL FILED IN THE STATE COURT.)

That thereupon, your petitioner, Frank D. Winn, as plaintiff in said cause, filed in said District Court of Iowa in and for Polk County, his objections to the removal of the said cause to the said Circuit Court of the United States, which objections, so filed, are as follows:

In the District Court of the State of Iowa in and for Polk County. September Term. A. D., 1908.

"Frank D. Winn, *Plaintiff.*	)	
vs.	)	In Law. No. 17325.
The American Express Company,	)	Resistance to petition
Defendant.	)	for Removal.

Comes now the plaintiff, Frank D. Winn, and answering and resisting the petition for the defendant, for removal of the above entitled cause to the United States Circuit Court for the Southern District of Iowa, Central Division, respectfully sheweth unto the Court as follows:—

The original plaintiff herein denies that this case involves a controversy or dispute, properly within the jurisdiction of the said United States Circuit Court, and as reason for the said denial, respectfully alleges, denies, and states as follows:—

Plaintiff denies that this cause is properly removable to the said court on the ground of diverse citizenship, for the reason that the record herein plainly shows that it is a controversy between a citizen of the State of Missouri, plaintiff, and a citizen of the State of New York, the defendant,

and the said cause is not within the original jurisdiction of the said United States Circuit Court, and the said Circuit Court cannot acquire jurisdiction by removal, this plaintiff resisting.

The plaintiff further denies that this cause is one which arises under the laws of the United States, nor can it be said from an examination of the original petition filed herein, that there is a single allegation therein which involves a Federal Question. This cause is an action based upon the negligence of a common carrier, for damages.

This plaintiff denies that this cause as set up in the said suit is based upon, grows out of, or necessarily involves the construction of any statutes, laws, treaties, acts or other provisions of the Congress of the United States.

The said plaintiff, saving and reserving any and all objections which he has to the manifold imperfections in the manner of presenting the petition for removal to this court, and to all and singular the immaterial and irrelevant allegations therein contained, and answering severally the allegations of Federal questions stated to be involved in this cause, states as follows:—

(a) Plaintiff denies that the violation of any penal statute, State or Federal can or does enter into the merits of this cause, either by way of demand, defense or criminal prosecution; and plaintiff further denies that this action is based upon a contract of any nature whatever, as alleged in petition for removal, but alleges that the same is based, wholly and solely, upon tort.

(b) The plaintiff denies that the question of interstate commerce rates is involved in this case, and further denies that the interstate commerce act limited or attempted to limit, mentioned or included in it a single word relative to a limitation upon the amount of damages to be recovered in any case whatsoever.

(c) Plaintiff denies that the question of the validity or invalidity, enforceability or unenforceability of the limited liability contract has anythng whatever to do with the Federal Laws and Statutes, or presents a Federal question of any nature, but, contra, alleges that the validity or invalidity, enforceability or unenforceability of the said contract is cognizable by the courts of this state, or the particular state in which the said contract was made.

(d) Plaintiff denies that the Interstate Commerce Act made any provision for or reference to the assertion of values of live stock, or to the estoppel of shippers or their assignees from setting up any claim as to value, and further denies that this action is brought upon a contract as alleged in petition for removal.

(e) Plaintiff denies that any violation of any Criminal Code or law of the United States, or any other country, or any state, is involved in this case and further denies that the said act provides for, enacts or declares the undervaluation of property shipped by the shipper a crime, whether the undervaluation be made to secure a lower rate or for any other purpose.

(f) Plaintiff denies that the doctrine of "Preclusion of Recovery" involves particularly a Federal question and that that doctrine is cognizable only by Federal Courts. Plaintiff further denies that this suit is based upon any wrong of the shipper, but, contra, alleges that it is based upon the wrong of the defendant, The American Express Company, as the reading of the original petition herein filed will disclose.

(g) Plaintiff denies that there are any questions arising herein under the Act to Regulate Commerce, as amended, and denies that a single matter herein involves in any way the Act to Regulate Commerce, or any other United States Law.

Again referring to the petition of removal as filed herein, and to the imperfections therein, plaintiff denies the right

of the defendant to set forth the said matters in his petition as alleged in paragraphs a, b, c, d, e, f, g, and others, or any other matter explanatory of the said cause, and further respectfully sheweth unto this Honorable Court that it is not the province of this Honorable Court to consider the said matters of explanation, since, if the said cause is a removable one, that said fact must be determined by the allegations in the plaintiff's petition original, as no statement in the petition for removal can supply the want of an allegation of a Federal Question by the plaintiff in his petition.

Wherefore, the plaintiff, Frank D. Winn, resisting the said petition for removal, doth pray this Honorable Court to refuse the said order asked in defendant's petition, and doth further pray an order, directed to the said defendant to plead in this court forthwith, and further render judgment against defendant for the costs hereof.

Signed. FRANKLIN & MILLER,
Attorneys for Plaintiff.

State of Iowa,

ss.

County of Polk.

I, Guy A. Miller, upon oath depose and say that I am a member of the firm of Franklin & Miller, which firm appears as attorneys for the plaintiff herein; that I have knowledge of the facts concerning the said cause, have read the foregoing resistance and know the contents thereof, and that the allegations and denials therein contained are true and correct as I verily believe.

GUY A. MILLER.

Subscribed and sworn to before me this 12th day of Sept., A. D. 1908.

O. S. FRANKLIN.

SEAL. Notary Public in and for Polk County."

V.

That thereafter, and on the 1st day of December, A. D., 1908, the said District Court of Iowa in and for Polk County, entered an order denying the order asked by defendant to remove the said cause, as follows:

"FRANK D. WINN,

vs. No. 17325.

THE AMERICAN EXPRESS COMPANY.

Petition for Removal to Circuit Court of the United States, for the Southern District of Iowa, Central Division.

Overruled—defendant excepts."

VI.

(MOTION TO REMAND.)

Your petitioner further shows that within the time required by law, the said defendant did make a copy of the record in the said cause in the said District Court of Iowa. in and for Polk County, and did on the 31st day of October, A. D., 1908, file the same in the Circuit Court of the United States, for the Southern District of Iowa, Central Division, where the same was duly docketed and numbered 3804 Law; that on the16th day of November, A. D., 1908, and within the time required by law, and before any other and further proceedings were had in the said cause in the Circuit Court of the United States for the Southern District of Iowa, Central Division, the plaintiff filed in said court his motion to remand said cause, which motion is as follows:—

"FRANK D. WINN,

vs. Law, No. 3804.

THE AMERICAN EXPRESS COMPANY.

In the United States Circuit Court for the Southern District of Iowa, Central Division.

Comes now the plaintiff, by his attorneys, Franklin & Miller, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers, and to all and singular the immaterial and irrelevant allegations therein contained, and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the District Court of Iowa, in and for Polk County, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Missouri, and the defendant a resident of the State of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

Plaintiff denies each and every allegation in the petition for removal contained relative to the Federal Questions involved, and also to the allegatons that this cause arises under the Constitution, treaties, or laws of the United States, and further denies the right of the defendant to incorporate in its petition for removal the lengthy, irrelevant, and immaterial explanatory matter relative to the said allegations.

Wherefore your petitioner respectfully prays the court to order the said cause remanded to the District Court of Iowa in and for Polk County from whence it was removed, for

trial, and to assess the costs hereof to the defendant and their bondsmen.

FRANKLIN & MILLER,
Attorneys for Plaintiff."

VII.

(HEARING AND DENIAL OF MOTION TO REMAND.)

That the defendant filed no resistance to the said motion, and that subsequently and before any further and other proceedings were had in said cause, the said motion to remand came on to be heard, and the same having been submitted on the record and briefs of Plaintiff, your petitioner, and of the defendant, The American Express Company, was overruled and denied by the said Circuit Court of the United States for the Southern District of Iowa, Central Division, Hon. Smith McPherson, District Judge, sitting as Judge of said Court. And the said Hon. Smith McPherson, Judge as aforesaid, entered his order, judgment and decree therein, overruling and denying the said motion to remand, which is incorporated in "Exhibit A", hereto attached and made a part hereof, to which ruling plaintiff then and there excepted.

VIII.

(MANDAMUS ONLY ADEQUATE REMEDY).

Your petitioner further shows that by the ordinary remedy of appeal from final judgment of the Circuit Court of the United States in said suit at law, it may and probably will be several years before the question whether the said court should have retained jurisdiction of the said cause,

can be considered and determined by this Honorable Court; that your petitioner will be put to great expense, trouble and delay, in prosecuting said suit in said Circuit Court, Circuit Court of Appeals, and in the United States Supreme Court, all of which your petitioner believes to be unnecessary by reason of the lack of jurisdiction of said Circuit Court; that by reason of all these said facts and circumstances your petitioner has no remedy unless this Honorable Court interferes by writ of mandamus.

IX.

Petitioner further shows that he has furnished copies of this petition for mandamus and brief prepared by him, to N. T. Guernsey, attorney of record for the American Express Company, and to Judge Smith McPherson, Distict Judge for the Southern District of Iowa, Central Division.

X.

PRAYER.

Wherefore your petitioner prays that a rule be made and issue from this Honorable Court, directed to the said Honorable Smith McPherson, District Judge of the Southern District of Iowa, Central Division, and directing the said Circuit Court of the United States for the Southern District of Iowa, Central Division, to show cause why a writ of mandamus should not issue, commanding the said Judge and the said Court, and each of them to remand said suit at law to the District Court of Iowa in and for Polk County, and to desist from exercising any further jurisdiction in said suit, except to enter an order remanding said suit, and for such

other and further relief in the premises as shall seem just and meet, and your petitioner will ever pray.

W. H. Brunner
Guy A. Miller
Counsel for Petitioner.

State of Iowa,
SS.
County of Polk.

I, Guy A. Miller, being duly sworn, depose and say that I am a member of the firm of Franklin & Miller, who appear as attorneys for the above named petitioner, Frank D. Winn: that I have personal knowledge of all the proceedings which have been had in the several courts mentioned in said petition, and of the facts therein referred to; that I have read the foregoing petition, and that the statements made in the foregoing petition are true, and the copies of original documents mentioned therein are true and correct copies of such originals, and that the excepts therefrom and narratives thereof are true and correct, and are as affiant verily believes full and complete as to all material matters.

Guy A. Miller

Subscribed and sworn to before me this 12th day of February 1909.

O. J. Franklin

SEAL. Notary Public in and for Polk Co.

"EXHIBIT A".

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

FRANK D. WINN,
vs.
THE AMERICAN EXPRESS COMPANY.
NO. 3804 Law.

On the 24th day of November, 1908, at the November Term of this court, begun and holden in Des Moines, in and for the Southern District of Iowa, Central Division, and before the undersigned District Judge there came on to be heard the plaintiff's motion to remand this cause to the District Court of Iowa in and for Polk County, from whence it had been removed by the defendant; and thereupon the plaintiff presented his motion to have the said cause remanded, which motion is as follows:

"FRANK D. WINN.
vs. Law, No. 3804.
THE AMERICAN EXPRESS COMPANY.

In the Circuit Court of the United States for the Southern District of Iowa Central Division.

Comes now the plaintiff, by his attorneys, Franklin & Miller, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers, and to all and singular the immaterial and irrelevant allegations therein contained, and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the District Court of Iowa in and for Polk County, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it

appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Missouri, and the defendant a resident of the State of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

Plaintiff denies each and every allegation in the petition for removal contained relative to the Federal questions involved, and also to the allegations that this cause arises under the Constitution, treaties, or laws of the United States, and further denies the right of the defendant to incorporate in his petition for removal the lengthy, irrelevant, and immaterial explanatory matter relative to the said allegations.

Wherefore your petitioner respectfully prays the court to order the said cause remanded to the District Court of the State of Iowa in and for Polk County, from whence it was removed, for trial, and to assess the costs hereof to the defendant and their bondsman.

FRANKLIN & MILLER,
Attorneys for Plaintiff."

And thereupon the said parties submitted the same, on said motion, and no testimony was offered by either party, and after the argument of counsel, and thereafter at a subsequent day of said term of court, to wit: On the 3rd day of December, 1908, the said motion to remand was overruled and denied as appears from judgment of the court, and plaintiff excepted to said order of court overruling said motion, which exception of plaintiff was then and there allowed, and same appears of record in this case.

JUDGMENT OVERRULING AND DENYING MOTION TO REMAND.

"FRANK D. WINN,

vs. Law, 3804.

THE AMERICAN EXPRESS COMPANY.

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

This cause came on this day for hearing on plaintiff's motion to remand this cause to the District Court of Iowa and the Court being sufficiently advised overrules said motion to which the plaintiff excepts.

Dated this 3rd day of December, A. D., 1908.

Signed. SMITH MCPHERSON,

District Judge."